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No. 81-2161

In the Supreme Court of the United States

OCTOBER TERM, 1982

ST. CLAIR GRIFFITH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

R. CHRISTOPHER LOCKE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court properly denied petitioner's motion for a new trial based on newly discovered evidence that a government agent at trial had subsequently been discharged for false testimony and misconduct in unrelated proceedings.

2. Whether the district court properly failed to conduct a hearing into the credibility of a government witness.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 31-33) is not reported. The memorandum opinion of the district court denying petitioner's motions for a new trial and for vacation or reduction of the sentence (Pet. App. 34-50), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1982. The petition for a writ of certiorari was filed on Monday, May 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of knowingly possessing Schedule I and II controlled substances, in violation of 21 U.S.C. 841(a)(1). He was

sentenced to concurrent terms of ten years' imprisonment on each of two counts, to be followed by a three-year special parole term, and was fined $20,000 (Pet. App. 34). The court of appeals affirmed, and this Court denied certiorari. *United States* v. *Griffith*, 601 F. 2d 591 (6th Cir.), cert. denied, 444 U.S. 931 (1979).

In December 1979 petitioner filed a motion for reduction of sentence under Fed. R. Crim. P. 35. In June 1980 the Rule 35 motion was combined with a motion to vacate sentence under 28 U.S.C. 2255 and a new trial motion (Fed. R. Crim. P. 33; Pet. App. 35). The district court denied all the motions (Pet. App. 34-50) and the court of appeals affirmed (Pet. App. 31-33).

1. The evidence adduced at trial established that on September 16, 1977, agents of the Drug Enforcement Administration (DEA) searched petitioner's residence pursuant to a warrant based on information furnished by a confidential informant. Approximately 123 grams of heroin, two grams of cocaine, 1700 grams of manitol, six loaded guns and $20,780 in cash were seized from the premises (May 17-18 Tr. 28-35, 121-122, 212-216; May 19 Tr. 114). Petitioner's fingerprint was found on a plastic bag containing heroin, although he claimed that it was "planted" there by Louis Antonucci, a DEA agent who participated in the search (Pet. 6-7). At the time of the search, petitioner, his wife and his four children were the only persons present at the residence (May 17-18 Tr. 25, 118; May 19 Tr. 21).

Louis Antonucci was one of three DEA agents who testified at trial about the events surrounding petitioner's arrest and the seizure of evidence at his residence (Pet. App. 41). Petitioner's counsel cross-examined these witnesses at length and attempted to discredit their testimony in closing argument. See, *e.g.*, May 17 Tr. 49-112, 134-179; May 19 Tr. 29-46; May 23 Tr. 164-170.

2. Several months after petitioner's trial, Agent Antonucci testified in the unrelated narcotics case of *United States* v. *Francis*, Cr. No. 78-80782 (E.D. Mich., Mar. 7, 1979), before the same district judge (Judge Feikens) who had presided at petitioner's trial. In that case the court found "that Antonucci's testimony that defendant Francis was accidentally injured at the time of arrest was not credible, and concluded instead that Antonucci struck the defendant" (Pet. App. 38, 59-61; I C.A. App. 90-95).[1] Thereafter, Antonucci testified at a suppression hearing in *United States* v. *Stanley*, Cr. No. 79-80546 (E.D. Mich., Mar. 12, 1980), another proceeding unrelated to petitioner's case. During the hearing, District Judge Avern Cohn commented that he did not believe Antonucci's explanation of a discrepancy in a DEA report and was skeptical about Antonucci's testimony that he did not keep notes of his contacts with informants (Pet. App. 38, 62-70; I C.A. App. 96-113).[2]

Agent Antonucci's employment with DEA was terminated on August 8, 1980, following an internal agency investigation (Pet. App. 36). A report on the results of that investigation cited "false statements, misstatements and concealment of material facts" in the case of *United States*

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[1]"C.A. App." refers to the appendix in the court of appeals.

[2]Petitioner alleged two additional acts of misconduct, based upon (1) the testimony of the defendant in the unrelated case of *United States* v. *Hatcher*, Cr. No. 79-80090 (E.D. Mich., Oct. 17, 1979 Suppression Hearing), that Antonucci called him and threatened to have his bond revoked if he failed to cooperate; and (2) affidavits of petitioner's wife and mother-in-law that refute Antonucci's testimony at petitioner's bond revocation hearing that petitioner had pistol-whipped his wife after conviction, and an offer of testimony from petitioner that Antonucci called him after trial and threatened to have his bond revoked if he did not cooperate (Pet. 12; Pet. App. 39; 71-75; I C.A. App. 86-89).

v. *Francis, supra*, and in the internal investigation in connection with the *Francis* case, as a reason for termination (II C.A. App. 3).[3] The report does not disclose any evidence or findings of misconduct by Antonucci in the investigation or trial of petitioner (Pet. App. 37; II C.A. App. 1-3). Petitioner's motion for a new trial was based on the subsequent criticism of Antonucci's conduct in these other cases.

3. In its memorandum opinion and order denying petitioner's motions, the district court concluded that the proffered evidence of Antonucci's misconduct and false statements in unrelated proceedings was merely impeaching and was not such that it would probably produce a different result on retrial (Pet. App. 40-42):

> I do not find in this case that the new evidence presented by petitioner, which would serve to impeach rather than directly contradict Agent Antonucci's testimony at trial, is such that it would probably produce a different result on retrial. There were two other DEA agents who testified about the events surrounding [petitioner's] arrest, so the government did not rely solely on Agent Antonucci's testimony to prove its case. There was ample evidence apart from Agent Antonucci's testimony from which the jury could have concluded that the petitioner was in possession of the heroin and cocaine found in a closet in his home. * * * Consequently, petitioner's motion for a new trial pursuant to Rule 33 is denied.

The court of appeals affirmed (Pet. App. 31-33).

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[3]The government provided the DEA files on Louis Antonucci to the district court for *in camera* review, and thereafter provided petitioner with copies of portions of the file relevant to his claim that Antonucci's testimony was "likely perjured" (Pet. App. 36).

ARGUMENT

Petitioner contends (Pet. 2-3, 13-14) that instances of alleged misconduct in subsequent cases sufficiently "taint" Antonucci's testimony in this case that a new trial is required. Alternatively, petitioner argues (Pet. 2-3, 14-15) that even if a new trial were not required, the district court erred in not holding a hearing into Antonucci's credibility. These fact-laden contentions do not warrant review by this Court.

1. Petitioner relies heavily on this Court's opinion in *Mesarosh* v. *United States*, 352 U.S. 1 (1956). The decision in *Mesarosh*, however, depended on a unique set of facts not present here. It has not been extended, and should not be, to circumstances like those of this case.

Mesarosh involved a Smith Act conspiracy to advocate the overthrow of the United States government by force and violence. At trial a government informant testified about the activities of members of the American Communist Party in connection with the conspiracy. 352 U.S. at 3-4, 10. On direct review by this Court, the Solicitor General brought to the Court's attention, shortly before oral argument, the informant's untruthful testimony in other proceedings regarding the activities of the American Communist Party. The false testimony occurred before a Committee of the United States Senate during the same period as the informant's testimony at petitioner's trial, and at subsequent proceedings before the Senate and before a Florida Circuit Court. *Id.* at 4-7. In addition to providing false testimony about the activities of the American Communist Party, the informant testified falsely about his own arrest and conviction record. *Id.* at 5-7.

The Solicitor General conceded that the informant's testimony at petitioners' trial, although not known to be false,

was essential to the convictions of at least two of the petitioners. The United States therefore moved the Court to remand for a hearing on the credibility of the informant. 352 U.S. at 3, 8. The Court declined to remand for a hearing, concluding that the informant's credibility had been "wholly discredited by the disclosures of the Solicitor General" and that this was not a case where "the District Court, on a remand could make an unassailable finding that [the informant's] other falsehoods were differentiated from his testimony herein." *Id.* at 9, 13. On this basis, the Court held that a new trial was required.

Mesarosh did not, however, establish a per se rule mandating reversal or a new trial where the credibility of subsequent testimony in unrelated cases is relied upon to challenge a conviction. Indeed, the Court expressly observed (352 U.S. at 9; footnote omitted):

> It must be remembered that we are not dealing here with a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, presenting untruthful statements by a Government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial. Such an allegation by the defense ordinarily will not support a motion for a new trial, because new evidence which is "merely cumulative or impeaching" is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial.

The present case is, accordingly, not controlled by *Mesarosh*. It is, in fact, precisely the situation this Court distinguished from the facts presented in *Mesarosh*—a defense allegation that newly discovered impeaching evidence requires a new trial. Here, the district court explicitly found, and the record shows, that ample evidence apart from Antonucci's testimony supports the jury's verdict.

Moreover, the district court in the present case was in a unique position to differentiate Antonucci's other testimony from his testimony at petitioner's trial: the same judge who ruled on the motion had presided both at petitioner's trial and at the trial in *United States* v. *Francis*, *supra*, where Antonucci gave the testimony for which his employment was subsequently terminated. Accordingly, the district court's findings are entitled to considerable weight. *United States* v. *Hamilton*, 559 F. 2d 1370, 1373-1374 (5th Cir. 1977). It is clear from his opinion (Pet. App. 34-42) that Judge Feikens thoroughly reviewed the record in these proceedings, as well as other evidence presented in support of the motion. It is, of course, proper for the trial judge to utilize the knowledge he gained from the trial as well as the showing made on the motion in considering whether a new trial is warranted. *United States* v. *Johnson*, 327 U.S. 106, 112 (1946). Thus, the district court here could and did distinguish Antonucci's testimony at other proceedings from his testimony at petitioner's trial. The court of appeals correctly affirmed the denial of petitioner's motions, and this fact-bound result does not warrant review by this Court. *United States* v. *Hamilton*, *supra*, 559 F. 2d at 1373.

Other cases relied upon by petitioner are equally distinguishable. In both *Williams* v. *United States*, 500 F. 2d 105 (9th Cir. 1974), and *United States* v. *Chisum*, 436 F. 2d 645 (9th Cir. 1971), the Ninth Circuit was faced with a conviction substantially based upon the testimony of an agent who was later indicted or convicted of perjury in contemporaneous and similar proceedings. *Williams* v. *United States*, *supra*, 500 F. 2d at 107-108; *United States* v. *Chisum*, *supra*, 436 F. 2d at 646-648.[4] Petitioner's conviction in the

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[4]Petitioner's reliance on *United States* v. *Willis*, 467 F. Supp. 1111 (W.D. Pa.), aff'd, 606 F. 2d 391 (3d Cir. 1979), is similarly misplaced. There the district court found that two of three surveillance agents had

present case is not based substantially upon Antonucci's testimony. The district court concluded, and the evidence shows, that the conviction was based in large part on the testimony of others and that the result would probably not be different on retrial simply because Antonucci's credibility would now be seen to be more suspect.

Moreover, petitioner failed to demonstrate that the evidence of Antonucci's alleged subsequent misconduct was more than merely impeaching.[5] As the Ninth Circuit has

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testified falsely about material issues at the defendant's trial. Those agents subsequently pleaded guilty to falsifying surveillance records used to convict the defendant. In the present case, petitioner can offer only allegations of false statements in unrelated proceedings.

In *United States* v. *Krasny*, 607 F. 2d 840 (9th Cir. 1979), cert. denied, 445 U.S. 942 (1980), the issue before the court was whether a new trial was required where the government presented material testimony that it later conceded was probably false. Significantly, the court of appeals concluded that the district judge was competent to determine whether the evidence of false testimony would probably produce a different result on retrial. Since the district court record was insufficient to allow the court of appeals to determine whether this had been done, the case was remanded for the necessary findings. 607 F. 2d at 846. The present case involves neither alleged perjury in the trial itself nor an inadequate record.

[5]In order to prevail on a Rule 33 motion a defendant must establish, *inter alia*, that the new evidence is not merely cumulative or impeaching, that the evidence is material to the principal issues involved, and that the evidence is of such a nature that it would probably produce an acquittal on retrial. *United States* v. *Brashier*, 548 F. 2d 1315, 1327 (9th Cir. 1976), cert. denied, 429 U.S. 1111 (1977); *United States* v. *Garner*, 529 F. 2d 962, 969 (6th Cir.), cert. denied, 426 U.S. 922 (1976); *United States* v. *Schwarzbaum*, 527 F. 2d 249, 254-255 (2d Cir. 1975), cert. denied, 424 U.S. 942 (1976). The district court correctly concluded that petitioner did not satisfy these requirements, and this determination must be upheld absent an abuse of discretion. *United States* v. *Wallace*, 578 F. 2d 735, 742 (8th Cir.), cert. denied, 439 U.S. 898 (1978); *United States* v. *Hamilton*, *supra*, 559 F. 2d at 1373. The court of appeals concluded that there was no abuse of discretion, and that conclusion is adequately supported.

stated, "[e]vidence which may impeach a government witness, although discovered after trial, is not enough without a greater showing that a new trial is required * * *." *United States* v. *Brashier*, 548 F. 2d 1315, 1327 (1976), cert. denied, 429 U.S. 1111 (1977). See also *United States* v. *Hirst*, 668 F. 2d 1180, 1185 (11th Cir. 1982); *United States* v. *Gilbert*, 668 F. 2d 94, 96 (2d Cir. 1981); *United States* v. *Martorano*, 663 F. 2d 1113, 1119-1120 (1st Cir. 1981); *United States* v. *Librach*, 609 F. 2d 919, 921-922 (8th Cir. 1979). The district court here concluded (Pet. App. 40-41) on the basis of the proffered evidence and the trial record that the new evidence presented by petitioner "would serve to impeach rather than directly contradict Agent Antonucci's testimony at trial * * *."

Petitioner also failed to demonstrate that the evidence of Antonucci's alleged subsequent misconduct "would probably produce an acquittal" on retrial, an equally well-settled requisite to the granting of a Rule 33 motion based on new evidence. *United States* v. *Brashier, supra*, 548 F. 2d at 1327; *United States* v. *Stofsky*, 527 F. 2d 237, 246-247 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976). Here again, the district court made detailed findings and concluded (Pet. App. 34-42) that it could not find that petitioner's proffered evidence "would probably produce a different result on retrial" (*id.* at 41).

Thus, "[t]his case is controlled by the fact that evidence not under attack amply sustains the convictions." *United States* v. *Hamilton, supra*, 559 F. 2d at 1373. Moreover, in the absence of the specific, identifiable taint present in *Mesarosh* and the other decisions upon which petitioner relies, the rule he proposes would lead, whenever an officer is disciplined or gives testimony found not credible in another case, to new trials for defendants in all cases in which that officer had testified. Neither *Mesarosh* nor any

other decision calls for the imposition of such harsh sanctions on the government in cases of new evidence of relevance as remote as in this case.

? Recognizing that the cases upon which he relies may sufficiently distinguishable as to not warrant the grant of a new trial" (Pet. 14), petitioner raises the alternative argument that the district court erred in not ordering an evidentiary hearing on his new trial claim.[6]

The decision whether to hold an evidentiary hearing was addressed to the sound discretion of the district court. Such claims are generally decided on the basis of the trial record and affidavits alone. *United States* v. *Hamilton, supra*, 559 F. 2d at 1373; *United States* v. *Scott*, 521 F. 2d 1188, 1195-1196 (9th Cir. 1975), cert. denied, 424 U.S. 955 (1976); *United States* v. *Henson*, 486 F. 2d 1292, 1300 n.7 (D.C. Cir. 1973); *Gurleski* v. *United States*, 405 F. 2d 253, 267 (5th Cir. 1968), cert. denied, 395 U.S. 977 (1969); see also 28 U.S.C. 2255, Rule 8(a).[7] A trial judge who has presided over

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[6]It may be inferred from petitioner's "offer of testimony" before the district court (Pet. App. 39) that a request for an evidentiary hearing was addressed to that forum. It does not appear, however, from petitioner's brief to the court of appeals that he raised the issue there of error in failing to conduct such a hearing. Absent exceptional circumstances, not present here, arguments which were not raised below will not be reviewed by this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

[7]Indeed, the district court went beyond what was required of it under the federal rules, by providing petitioner with collateral discovery of relevant portions of Antonucci's DEA personnel file and by considering this and other evidence before ruling on the motion. The only evidence petitioner indicated he would offer at an evidentiary hearing, beyond that which the district court already had before it, was his own testimony that Antonucci called him after trial to solicit his cooperation with a threat that otherwise he would have his bond revoked (Pet. App. 39). In these circumstances, petitioner cannot be heard to complain that

the full course of the proceedings and, in this case, in collateral proceedings called into question, is particularly well qualified to rule without conducting an evidentiary hearing. *United States* v. *Hamilton, supra*, 559 F. 2d at 1373-1374. Hence, the district court did not abuse its discretion in disposing of the motions on the record before it without an evidentiary hearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

R. CHRISTOPHER LOCKE
Attorney

JULY 1982

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the district court abused its discretion in not holding a hearing regarding this allegation, which even if true would not have added greatly to the strength of petitioner's request for a new trial.

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